DATO' VALUMALAI V MUTHUSAMY A

v.

DATO' DR TAN CHIN WOH

COURT OF APPEAL, PUTRAJAYA B
TENGKU BAHARUDIN SHAH JCA
ZAINUN ALI JCA
HISHAMUDIN MOHD YUNUS J
[CIVIL APPEAL NO: N-02-913-2001]
19 APRIL 2010 C

CIVIL PROCEDURE: *Appeal - Notice of appeal - Service of - Whether served after expiration of time - Rules of the Court of Appeal 1994, rr. 5(1), 6, 12 - Whether appeal incompetent*

The appellant filed a notice of appeal dated 12 October 2001 against the decision of the High Court made on 13 September 2001. The said notice of appeal was only served on the respondent on 15 October 2001. The respondent raised a preliminary objection and objected to the appeal for being incompetent on the ground that the notice of appeal was served after the expiration of the time specified under rr. 6 and 12 of the Rules of the Court of Appeal 1994 ('the RCA'). D E

Held (upholding preliminary objection; dismissing the appeal)
Per Tengku Baharudin Shah JCA delivering the judgment of the court: F

(1) Rule 5(1) must be read with rr. 6 and 12 of the RCA. The law is that an appeal is not 'brought' until the notice of appeal is both filed and served. The one act without the other renders the appeal incompetent. (para 6) G

(2) The period of one month as stipulated in r. 12(c) which commenced from the date the judgment was pronounced on 13 September 2001 ended on 12 October 2001 which according to the 2001 calendar fell on Friday, a working day. As it was not disputed that the notice of appeal was only served on the respondent's solicitors on 15 October 2001, the service was clearly out of time. (para 9) H

(3) The failure to serve the notice of appeal on the other party within time was not an irregularity that could be cured. This appeal was therefore incompetent. (para 10) I

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu memfailkan notis rayuan bertarikh 12 Oktober 2001 terhadap keputusan Mahkamah Tinggi yang diputuskan pada 13 September 2001. Rayuan notis tersebut diserahkan kepada responden pada
B 15 Oktober 2001. Responden membangkitkan bantahan awalan dan menentang rayuan kerana ia tidak kompeten atas alasan bahawa notis rayuan diserahkan selepas tarikh luput yang disenaraikan di bawah kaedah-kaedah 6 dan 12 Kaedah-kaedah Mahkamah Rayuan 1994 (KMR).

C **Diputuskan (membenarkan bantahan awal; menolak rayuan) Oleh Tengku Baharudin Shah HMR menyampaikan penghakiman mahkamah:**

D **(1)** Kaedah 5(1) mesti dibaca dengan kaedah-kaedah 6 dan 12 KMR. Undang-undangnya adalah rayuan tidak 'dibawa' sehingga notis rayuan telah difailkan dan diserahkan. Satu tindakan tanpa tindakan yang lagi satu menjadikan rayuan tidak kompeten.

E **(2)** Tempoh satu bulan yang diberi di dalam k. 12(c) yang bermula dari tarikh penghakiman disebut pada 13 September 2001 berakhir pada 12 Oktober 2001 yang menurut kalendar 2001 jatuh pada hari Jumaat, hari kerja. Tidak dipertikaikan bahawa notis rayuan hanya diserah ke peguam-peguam responden pada 15 Oktober 2001, penyerahan dibuat di luar masa.

F **(3)** Kegagalan menyerah notis rayuan ke atas pihak yang lain dalam masa yang telah ditetapkan bukan satu luar aturan yang boleh diperbetulkan. Oleh itu rayuan ini adalah tidak kompeten.

Case(s) referred to:

G *Gurbachan Singh v. Seagrott & Campbell (No 2) [1962] 1 LNS 48 HC* ***(refd)***

Jeow Fong Mei v. Chong Mee Yoke [1996] 2 CLJ 23 CA ***(refd)***

Majlis Perbandaran Kangar v. Sonati Development Corporation Sdn Bhd [2006] 4 CLJ 953 CA ***(refd)***

H *Migotti v. Colvill [1879] 4 CPD 233* ***(refd)***

Soh Keng Hian v. American International Assurance Co Ltd [1996] 2 CLJ 449 CA ***(refd)***

Tan Ting Kok v. Cheong Lep Keen & Anor [1969] 1 LNS 186 FC ***(refd)***

Tong Lee Hwa & Anor v. Malayan Banking Bhd [1978] 1 LNS 219 FC ***(refd)***

I **Legislation referred to:**

Rules of the Court of Appeal 1994, rr. 5(1), 6, 12(c)

Other source(s) referred to:
Words and Phrases Legally Defined, 2nd edn, p 291

For the appellant - In person
For the respondent - Yusof Khan Ghows (Sather Thulasi with him); M/s Affendi Zahari

[Appeal from High Court, Seremban; Civil Suit Nos: 22-69-1997 & 22-1-2001]

Reported by Suhainah Wahiduddin

JUDGMENT

Tengku Baharudin Shah JCA:

[1] We upheld the preliminary objection raised by the respondent and consequently dismissed this appeal with costs. We also ordered the deposit to be paid to the respondent towards the account of costs.

Preliminary Objection

[2] The respondent objected to the appeal for being incompetent on the ground that the notice of appeal was served on his former solicitors after the expiration of the time specified under rr. 6 and 12 of the Rules of the Court of Appeal 1994 (the RCA). For ease of reference the rules are as follows:

> 6. Service of notice of appeal.
>
> Notice of appeal shall be served on all parties directly affected by the appeal or their solicitors respectively within the time limited for the filing of the notice of appeal. It shall not be necessary to serve parties not so affected.
>
> 12. Time limit for appeal.
>
> No appeal shall, except by leave of the Court, be brought after the expiration of one month:
>
> (a) in the case of an appeal from an order in Chambers, from the date when such order was pronounced at the hearing;
>
> (b) in the case of an appeal against the refusal of an application, from the date of such refusal;
>
> (c) In all other cases, from the date on which the judgment or order appealed against was pronounced.

A **Submission**

[3] Learned counsel for the respondent referred us to the notice of appeal dated 12 October 2001 filed on the same day against the decision of the High Court made on 13 September 2001. The said
B notice of appeal was only served on the respondent's former solicitors on 15 October 2001. He submitted that the notice of appeal was filed on the last date for appeal but served out of time because the RCA requires both filing and service to be affected within one month from the date on which the order was
C pronounced.

[4] The appellant contended that service was effected within time. He relied on the case of *Soh Keng Hian v. American International Assurance Co Ltd* [1996] 2 CLJ 449 CA which apparently computed the last date for filing an appeal against the decision made on
D 3 September 1994 was 4 October 1994 and not 3 October 1994. He submitted that service of his notice of appeal on Monday 15 October 2001 complied with the law as the last day for doing so (14 October 2001) was a Sunday.

E **[5]** In reply, learned counsel for the respondent argued that in computing time by calendar months, the time had to be reckoned by looking at the calendar and not by counting the days. So the one month period commenced from the day the order was pronounced to the day numerically corresponding to that day in the
F following month, less one (see *Jeow Fong Mei v. Chong Mee Yoke* [1996] 2 CLJ 23 CA). Therefore, in this case, the decision being made on 13 September 2001, the final day for service was 12 October 2001 which was a Friday. He stressed that under r. 12(c) of the RCA time starts to run from the date on which the
G judgment or order appealed against was pronounced.

Finding

[6] In construing the provision relating to appeals, one must not ignore the provision under which it is commenced. This is found in
H r. 5 of the RCA which relevant part reads:

> 5. Appeal to be by re-hearing on notice.
>
> (1) Appeals to the Court shall be by way of re-hearing and shall
I be brought by giving notice of appeal.

Rule 5(1) must be read with rr. 6 and 12. In our view, when read together, the law is that an appeal is not 'brought' until the notice of appeal is both filed and served. The one act without the other renders the appeal incompetent (see *Gurbachan Singh v. Seagrott & Campbell* (No. 2) [1962] 1 LNS 48 HC; *Tan Ting Kok v. Cheong Lep Keen & Anor* [1969] 1 LNS 186 FC; and *Tong Lee Hwa & Anor v. Malayan Banking Bhd* [1978] 1 LNS 219 FC). The rules of court therein considered are similar if not in *pari materia* with the aforesaid present rules of the RCA. This court is therefore bound by these decisions which are pertinent to the issue at hand, that is, whether the appeal is competent if service was not affected within the prescribed period of one month.

[7] The crucial words to be considered are "one month ... from the date on which the judgment or order appealed against was pronounced" found in r. 12(c) of the RCA. The word 'month' is defined in the Interpretation Acts 1948 and 1967 to mean a month reckoned according to the Gregorian calendar. The phrase "calendar month" was judicially considered in *Migotti v. Colvill* [1879] 4 CPD 233 where Brett LJ states the principle clearly in that in computing time by calendar month the time must be reckoned by looking at the calendar and not by counting the days.

[8] This principle is adopted in the definition of the same term in *Words and Phrases Legally Defined* (2nd edn) at p. 291 as follows:

> The term a calendar month is a legal and technical term .... The meaning of the phrase is that, in computing time by calendar months, the time must be reckoned by looking at the calendar and not by counting days; and that one calendar month's imprisonment is to be calculated from the day of imprisonment to the day numerically corresponding to that day in the following month less one (*Migotti v. Colvill* [1879] 4 CPD at p. 238 CA, per Brett LJ).

This court applied this definition when determining the validity of the termination of a sale and purchase agreement in *Jeow Fong Mei v. Chong Mee Yoke (supra)* when periods of three months plus an extention of two months from 14 July 1993 were given for completion of the sale transaction. Delivering the judgment of the court, Abdul Malek Ahmad JCA (as he then was) held that for the first three months from 14 July 1993, the period ended on 13 October 1993. On that premise the extention period could not commence on that date as the expiry would only be at midnight of that day, so the extention period only commenced on 14 October

A 1993, hence the termination letter dated 13 December 1993 was certainly one day too early. It was also held that it goes against common sense and logic for one period to end and another to commence on the same day.

B **[9]** Applying the same principle and reasoning to this case, the period of one month as stipulated in r. 12(c) which commenced from the date the judgment was pronounced on 13 September 2001 ended on 12 October 2001 which according to the 2001 calendar (see exh. DMR3 of the appellant's affidavit) fell on Friday, a C working day. As it was not disputed that the notice of appeal was only served on the respondent's solicitors on 15 October 2001 the service was clearly out of time.

[10] As stated earlier, an appeal is not brought to this court until D the notice of appeal is both filed and served, the one act without the other renders the appeal incompetent. Therefore, the failure to serve the notice of appeal on the other party within time is not an irregularity that can be cured. See *Majlis Perbandaran Kangar v. Sonati Development Corporation Sdn Bhd* [2006] 4 CLJ 953. This E appeal is therefore incompetent and must necessarily be and was accordingly dismissed.

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